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IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~1-802~~ 70-258

BETH KOEHLER DIEHL, ET AL,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

BETH KOEHLER DIEHL, ET AL,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 18, 1971.

CITATIONS TO OPINIONS BELOW:

The opinion of the District Court, printed in Appendix A of the separate bound Appendice, is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix B of the separate bound Appendice and is reported at 438 F. 2d 705.

JURISDICTION

1. The Judgment of the Circuit Court of Appeals was dated February 18, 1971, and it was entered on the same day.
2. The Order overruling the Motion for Rehearing was dated March 16, 1971.
3. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1346.

QUESTIONS PRESENTED

1. That full faith and credit should have been given to the judgment of the Probate Court, Harris County, Texas, appointing Beth Koehler Diehl as Independent Executrix of the Estate of Kent B. Diehl, Sr., and she should have been substituted in place of Kent B. Diehl, Sr., as one of the Plaintiffs.
2. That in the alternative that full faith and credit should have been given to the judgment of the Probate Court, Harris County, Texas, appointing Donald G. Ritter as Temporary Administrator of the Estate of Kent B. Diehl, Sr., and Donald G. Ritter should have been substituted as a Plaintiff in place of Kent B. Diehl, Sr.

STATUTES INVOLVED

The Statutory provisions involved are: Section 6 of the Texas Probate Code, Vernon's Texas Civil Statutes, Volume 17A, Probate Code; 28 U.S.C., Section 1738; and Article IV, Section 1 of the United States Constitution.

These statutes are printed in Appendix C of the separate bound appendice.

STATEMENT

This is a civil action for the recovery of federal income taxes for the calendar year 1957.

Kent B. Diehl, Sr., hereinafter called Mr. Diehl, and his wife, Beth Koehler Diehl, hereinafter called Mrs. Diehl, filed their 1957 joint income tax return with the District Director of Internal Revenue, Austin, Texas. The income reported in that return represented their community income. Thereafter Mr. Diehl filed a claim for refund for $5,546.21 for the calendar year 1957. On September 27, 1962, he filed his complaint in this cause based on his claim for refund. The Government filed a timely answer.

On December 17, 1962, the parties filed a joint motion for an order to stay proceedings requesting that the Trial Court stay all proceedings until disposition of the

criminal proceedings then pending against Mr. Diehl for alleged criminal tax violations and which cause was pending in the Trial Court. An order to that effect was entered.

On September 22, 1966, Mr. Diehl died and thereafter the criminal proceeding against him was dismissed.

On December 8, 1966, Mrs. Diehl, who at all times pertinent was a resident of Houston, Harris County, Texas, filed a "Motion of Intervention" alleging that she and Mr. Diehl filed a 1957 joint federal income tax return and paid the sum of $5,548.21 in tax with respect to that return, which amount represented community property of herself and Mr. Diehl. She further alleged that she was entitled to a portion of any income tax refund that may be recovered in that action and that she was an indispensable party to that

action. On December 12, 1966, the Trial Court entered an order granting her motion and permitting her individually to intervene as one of the plaintiffs in this cause. Thereafter she filed her pleadings entitled "Pleadings of Beth Koehler Diehl", wherein she adopted in it all of the pleadings which were previously filed in that cause by Mr. Diehl as if she had been a plaintiff when the original complaint was filed.

On February 13, 1967, Mrs. Diehl filed a motion that she, as Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased, be substituted as one of the plaintiffs in place of Mr. Diehl. In that motion she alleged that Mr. Diehl died September 22, 1966, and that she was appointed Independent Executrix of the Estate of Kent B. Diehl, Sr., hereinafter called estate, on January 24, 1967. The motion for substitution was not

opposed by the Government and an order was entered on February 20, 1967, granting the motion.

On August 2, 1967, the Government filed its first amended answer alleging a counterclaim against Mrs. Diehl individually and as Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased. The counterclaim alleged that on July 21, 1967, the Government made an assessment against Mr. and Mrs. Diehl for federal income taxes, civil fraud penalties and interest in the amounts of $499,337.95, $249,688.97, and $277,625.06, respectively, for the calendar year 1957. Mrs. Diehl individually and as Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased, filed their answer to the Government's counterclaim.

In his complaint Mr. Diehl alleged that this was a civil action for the

recovery of federal income taxes and that the Trial Court had jurisdiction under Section 1346 of Title 28 of the United States Code. In the Government's answer it admitted that the plaintiffs' cause of action was a civil action for the recovery of federal income taxes and that the Trial Court had jurisdiction under Section 1346 of Title 28 of the United States Code.

On September 28, 1967, the Government mailed to Mrs. Diehl in her representative capacity a proof of claim for the alleged taxes, interest and penalties covered in their counterclaim.

On May 20, 1968, the Government filed its "Motion to Vacate and to Stay Proceedings" asking that the Trial Court enter an order vacating its order substitituting Mrs. Diehl as Independent Executrix of the Estate of Kent B. Diehl, Sr., in place of Mr. Diehl and further requesting the Trial

Court to stay all further proceedings until a proper and duly qualified legal representative of Mr. Diehl is appointed and is substituted in place of Mr. Diehl. The Government's motion was filed by Mr. John O. Jones, Attorney, Tax Division, Department of Justice, hereinafter called Jones. The Government's motion outlined the history of the proceeding in this cause up to that time and then alleged that in connection with the application to probate the will of Mr. Diehl in the Probate Court, Harris County, Texas, that Mrs. Diehl, through her attorney, Dougal C. Pope, hereinafter called Pope, made the following allegations of material fact which were allegedly false and fraudulent and were allegedly made knowingly and willfully:

(a) That Mr. Diehl was domiciled in Harris County, Texas, at the time of his death.

(b) That Mrs. Diehl was the wife of

Mr. Diehl at the time of his death and that she is the widow of Mr. Diehl.

(c) That Mr. Diehl was never divorced.

(d) That Mrs. Diehl is not disqualified by law from accepting letters testamenary in and for the Estate of Kent B. Diehl, Sr., Deceased.

The motion further alleged that Mrs. Diehl was appointed Independent Executrix of the said estate because of the alleged false and fraudulent statements and that said order of the Probate Court appointing her as Independent Executrix was invalid. The motion further alleged that Mr. and Mrs. Diehl obtained an alleged mexican divorce on October 28, 1959, and that thereafter Mr. Diehl allegedly married Carmen Ramsey Diehl. The motion further alleged that Mr. Diehl was a resident of Glendale, California, at the time of his death and that Mrs. Diehl

and Pope knew of all of these facts when the application to probate the will was filed in the Probate Court, Harris County, Texas.

The Government's motion to vacate and to stay proceedings was supported by an affidavit of Mr. John O. Jones, hereinafter called Jones, the attorney for the Government.

In his affidavit Jones stated that he had been assigned this case for handling and had checked the files and had made certain investigations and that:

> "The information and assertions of fact contained in the motion are true and correct to the best of my knowledge, information, and belief. These assertions of fact are based upon my study of the files furnished to me, my investigation of this case conducted

in conjunction with the preparation of the same for trial, and my instructions given to other Government personnel regarding certain actions to be taken in this case.

"Based upon my study, investigation, and instructions, I believe the following to be a true and correct statement of facts:..."

In his affidavit Jones outlined the proceedings which had occurred in this cause and stated that on December 13, 1966, that Mrs. Diehl through Pope filed in the Probate Court, Harris County, Texas, in cause No. 94,261 an application for her to be appointed Administratrix of the Estate of Kent B. Diehl and stated the following in her application:

(a) That on the 22nd day of September, 1966, the deceased (Kent B. Diehl,

Sr.) died intestate and based on the applicant's understanding of the law his domicile was Harris County, Texas.

(b) That at the time of his death, the said deceased was seized and possessed of personal property of the probable value of $3000.00 which represents a claim against Internal Revenue Service for overpayment of income taxes for the year 1957.

(c) That there is a necessity for administration of the estate of the deceased because at the present time there is a suit pending in the United States District Court, Eastern District of Texas, Beaumont Division, in Civil Action No. 4662 in the cause of Kent B. Diehl, Sr. vs. United States of America, which

is the suit in connection with the above mentioned income tax refund and it is necessary that there be a substitution of parties in connection with that cause of action.

(d) That your applicant, based on her understanding of the law, is the wife of the deceased and she is entitled to letters of administration.

(e) That your applicant is not disqualified by law to act as Administratrix.

The affidavit further states that on January 9, 1967, that Pope amended his application for administration and filed a will of Mr. Diehl and asked that the will be admitted to probate as the last will and testament of Mr. Diehl and that Mrs. Diehl be appointed Independent Executrix of his estate.

The said application stated among other things the following:

(a) That the domicile of the deceased (Kent B. Diehl, Sr.) was Harris County, Texas, based on applicant's understanding of the law.

(b) That the principal part of deceased's property at the time of his death was personal property of the probable value of $3,000.00 which represents a claim against Internal Revenue Service for overpayment of income taxes.

(c) That the applicant is the wife of the deceased.

(d) That applicant is not disqualified by law from accepting letters testamentary in said estate. That the deceased was never divorced.

In Jones' affidavit he alleged that Mr. and Mrs. Diehl obtained an alleged mexican

divorce and attached as exhibits all of the papers filed in that proceeding. Jones also stated that Mr. Diehl and Carmen Ramsey were married in Missouri on November 26, 1959, and attached as an exhibit the alleged marriage license. Jones further stated that Mr. Diehl executed a last will and testament on December 31, 1959, wherein he declared that he was a resident of Pittsburg, Crawford County, Kansas, and that his property was left to his wife, Carmen Ramsey Diehl, and a copy of the alleged will was attached as an exhibit. Jones' affidavit further states that Mr. Diehl and Carmen Ramsey Diehl left Pittsburg, Kansas, in 1961 and moved to Glendale, California, where they were living as alleged husband and wife on September 22, 1966, when he died at the Glendale Memorial Hospital, Glendale, California.

Jones' affidavit further alleges that attached to his affidavit are copies of Mrs. Diehl's federal income tax returns for the years 1959 through 1966 and that each of these returns were prepared by Pope. On each of these returns for the years 1959 through 1965 in answer to the question as to the marital status of the taxpayer, the following was put on each return by Pope: "Due to the complexity of the law, taxpayer does not know the answer to this question" or words of similar meaning.

The Trial Court entered an order granting the Government's motion that Mrs. Diehl could not represent Mr. Diehl in her representative capacity and that all proceedings were stayed until a proper party was substituted in place of Mrs. Diehl.

On June 5, 1968, plaintiffs filed their Motion to Strike certain portions of the affidavit of Jones because there were no

facts in the affidavit to show that the statements were based on Jones' personal knowledge. The Motion to Strike asked that all statements of Jones relative to the following be stricken because they were not based on Jones' personal knowlege: that Mr. Diehl left Harris County, Texas, and moved his residence to Pittsburg, Crawford County, Kansas, where he resided until the year 1961, that Mr. Diehl and Carmen Ramsey were married in Missouri on November 26, 1959, that Mr. Diehl executed a last will and testament on December 31, 1959, and the alleged contents of same, that Mr. Diehl and Carmen Ramsey Diehl left Pittsburg, Kansas, during the year 1961 and moved their permanent residence to Glendale, California, and that at the time of Mr. Diehl's death that he and Carmen Ramsey Diehl were married and residing together as husband and wife in Glendale,

California. Also the plaintiff asked that the following statements be stricken because they were no more than legal conclusions on the part of Jones: that Mrs. Diehl and Mr. Diehl were divorced in October, 1959; that Mr. Diehl was not a resident of the State of Texas at the time of his death, that Mr. Diehl was married to Carmen Ramsey Diehl at the time of his death, and that Mr. Diehl had executed a last will and testament subsequent to the one which was filed for probate by Mrs. Diehl.

Plaintiffs filed an answer to the Defendant's motion to vacate and stay proceedings which had attached an affidavit of Mrs. Diehl stating the facts surrounding the alleged mexican divorce. She stated in her affidavit that she and Mr. Diehl went to Juarez, Mexico, for the specific purpose of obtaining a Mexican divorce and they stayed in Mexico for about five or six hours

on October 27, 1959, and that she signed a power of attorney so that a Mexican attorney could represent her. She stated that she did not go into any courtroom in connection with the alleged divorce and that her only purpose in going to Juarez, Mexico, was to stay there long enough to get the divorce and that she returned to Orange, Texas, where she resided, after she left Mexico, and that was her intention when she went to Mexico. Mrs. Diehl further stated that she had discussed her alleged Mexican divorce with at least four Houston, Texas, attorneys and each of them told her that they did not think that the alleged divorce was any good but that they could be wrong and that each of them told her that if she ever intended to remarry that she should get a Texas divorce.

The plaintiffs attached copies of the application for administration and application

for probate of Mr. Diehl's will to their answer. Also plaintiffs pointed out that the judgment of the Probate Court admitting Mr. Diehl's will to probate and appointing her as Independent Executrix of his estate was required to be given full faith and credit by the Trial Court; Section 1, Article IV of the United States Constitution and 28 U.S.C. Section 1738. Also it was pointed out that if the defendant felt that the Texas Probate Court had rendered a wrong decision that the Texas statute provided for several remedies to attack Probate Court judgments which are Right of Appeal, Section 28 of the Texas Probate Code, Vernon's Texas Civil Statutes, Volume 17A, Certiorari, Section 30 of the Texas Probate Code, Bill of Review, Section 31 of the Texas Probate Code, and that the Government was an interested person, Section 3(r) of the Texas Probate Code, and that there was a two year

period for contesting probate, Section 93 of the Texas Probate Code and that the two year period had not expired at that time. Plaintiffs suggested that the Government be required to pursue their remedies in the Texas State Courts and that the proceedings be stayed in the Trial Court until the Government could pursue their remedy in the State Court.

On November 25, 1968, the Trial Court entered a Memorandum Opinion and Order which affirmed its prior order that Mrs. Diehl as Independent Executrix of the Estate of Kent B. Diehl was not recognized as a party in place of Mr. Diehl and that all proceedings in the case be stayed until a proper party was substituted in place of Mr. Diehl.

In general, the Memorandum Opinion dated November 25, 1968, found as a fact the statements made by Jones in his affidavit and found that the statement as to

Mr. Diehl's domicle being in Texas as contained in the application to probate the will was false and that Mrs. Diehl was estopped to question the validity of the Mexican divorce and that the Texas Probate Court did not have jurisdiction to probate Mr. Diehl's will. The Trial Court further held that Mrs. Diehl and her attorney, Pope, in effect perpetrated a fraud on the Harris County Court and upon the Trial Court.

On January 27, 1969, the Government filed a Suggestion of Death Upon the Record in which under the provisions of Rule 25(a)(1) of the Federal Rules of Civil Procedure the death of Mr. Diehl was noted.

On February 17, 1969, Donald G. Ritter, hereinafter called Ritter, filed a Motion and Order that Donald G. Ritter, Temporary Administrator of the Estate of Kent B. Diehl, Sr., Deceased, be Substituted as One of the

Plaintiffs in Place of Kent B. Diehl, Sr. In that motion Ritter stated that he was appointed Temporary Administrator of the Estate of Kent B. Diehl, Sr., Deceased, on January 30, 1969, and Ritter attached to that motion as exhibits the papers which had been filed in the Probate Court No. 2, Harris County, Texas, in connection with his appointment. The order of the Probate Court appointing Ritter as Temporary Administrator gave him authority to be substituted as a party in place of Mr. Diehl in this cause and that he had authority to do any and all acts necessary in connection with this matter until the said cause is terminated, whether in the Trial Court or by appeal.

The Government did not oppose Ritter's motion to be substituted in his representative capacity in place of Mr. Diehl. The Trial Court granted Ritter's motion on

April 8, 1969. Thereafter, on April 18, 1969, Ritter filed his pleadings in this cause.

On October 31, 1969, without any notice to the plaintiffs, the Trial Court entered its Memorandum Opinion and Order which held that Ritter in his representative capacity was not a proper party to be substituted in place of Mr. Diehl. The Trial Court held that the Probate Court did not have jurisdiction to appoint Ritter as Temporary Administrator and, therefore, the appointment is void and not entitled to full faith and credit from the Trial Court. The Memorandum Opinion further held that the plaintiffs' action as well as the Government's counterclaim should be dismissed for want of jurisdiction of the Trial Court. An order to that effect was entered.

In general, the Appellate Court upheld the Trial Court and further found that as

to the appointment of Ritter that the power of a Temporary Administrator under Section 6(e) of the Texas Probate Code was for the purpose only of receiving money due an estate and that the power to collect the money was outside the realm of Section 6(e) of the Texas Probate Code and, therefore, Ritter's appointment was void. Also that Court held that Section 6(e) of the Texas Probate Code was not intended to allow strangers (Ritter) to administer an estate which would not have any assets in Texas.

ARGUMENT

1.

THAT FULL FAITH AND CREDIT SHOULD HAVE BEEN GIVEN TO THE JUDGMENT OF THE PROBATE COURT, HARRIS COUNTY, TEXAS, APPOINTING BETH KOEHLER DIEHL AS INDEPENDENT EXECUTRIX OF THE ESTATE OF KENT B. DIEHL, SR., AND SHE SHOULD HAVE BEEN SUBSTITUTED IN PLACE OF KENT B. DIEHL, SR., AS ONE OF THE PLAINTIFFS

The pertinent statutes are set forth in the separate bound Appendice.

After Mr. Diehl's death, Mrs. Diehl applied to the Probate Court of Harris County, Texas, for probate of Mr. Diehl's will. After a hearing on her application, the Texas Probate Court admitted the will to probate and appointed her as Independent Executrix of Mr. Diehl's estate. She applied to the Trial Court to be substituted in her representative capacity in place of Mr. Diehl and her motion was granted. Later the Trial Court refused to recognize her in her representative capacity as the

representative of Mr. Diehl's estate and held that she in her representative capacity was not a proper party to be substituted in place of Mr. Diehl and held that the Probate Court did not have jurisdiction to appoint her as Independent Executrix of Mr. Diehl's estate.

The Trial Court refused to recognize Mrs. Diehl in her representative capacity because it said that Mrs. Diehl and her attorney practiced fraud on the Probate Court in that Mrs. Diehl was not married to him when he died and that Mr. Diehl was not a resident of Texas when he died.

Mrs. Diehl first applied to the Probate Court for an administration of Mr. Diehl's estate. In her application, she stated that her residence and domicile was Harris County, Texas, that Mr. Diehl died September 22, 1966, intestate and "based on the applicant's understanding of the

law his domicile was Harris County, Texas", that based "upon her understanding of the law she is the wife of Mr. Diehl", that his property consisted of the claim involved in this suit of the value of about $3,000.00, that it was necessary for an administration because it was necessary for there to be a substitution of parties in this cause, and that she was not disqualified to act as administratrix.

Prior to the hearing on her application for administration, Mrs. Diehl found a will of Mr. Diehl which she believed to be the last will and testament of Mr. Diehl. She thereupon filed in the same Probate Court under the same cause number her application to probate will and for letters testamentary alleging that she had found a will of Mr. Diehl since she filed her application for administration and that she was now filing the application to probate the

will, that her domicile is Harris County, Texas, that Mr. Diehl died September 22, 1966, "that the domicile of the deceased was Harris County, Texas, based on applicant's understanding of the law", that the principal part of deceased's property was a claim against Internal Revenue Service for overpayment of income taxes in the amount of $3,000.00, that the deceased died testate, and that Mrs. Diehl was his wife and that Mr. Diehl had never been divorced.

A hearing was had on the application to probate the will and the Probate Court of Harris County, Texas, entered an order on January 24, 1967, admitting the will to probate and appointing Mrs. Diehl as Independent Executrix of his estate.

On February 13, 1967, Mrs. Diehl filed in her representative capacity in the Trial Court a motion that she be substituted in

place of Mr. Diehl and stated in her motion that Mr. Diehl died September 22, 1966, and that on January 24, 1967, that she was appointed Independent Executrix of his estate. This motion was not opposed by the Government and the Trial Court entered an order on February 20, 1967, substituting her in her representative capacity in place of Mr. Diehl.

Petitioners submit that the Probate Court had jurisdiction to appoint Mrs. Diehl as Independent Executrix of Mr. Diehl's estate and the Trial Court was required to give full faith and credit to the judgment of the Probate Court, Article IV, Section 1, United States Constitution, 28 U.S.C. Sec. 1738, and Hanley v. Donoghue, 116 U.S. 1, 6 S. Ct. 242, 244.

As to the alleged mexican divorce, Mrs. Diehl's affidavit which was attached as Exhibit E to the Plaintiff's Answer to

Defendant's Motion to Vacate and Stay Proceedings states that she and Mr. Diehl went to Mexico for the purpose of obtaining a Mexican divorce and they were there about five or six hours and that after signing some papers that they came back to the United States and that she went back to her residence in Orange, Texas, and that her intention was to stay in Mexico only as long as was necessary to get the divorce and that is what she did. She stated that she never went into a courtroom in Mexico. Mr. and Mrs. Diehl went to Mexico on October 27, 1959, and the divorce was granted the next day. Mrs. Diehl's affidavit shows that she did not establish any residence or domicile in Mexico and that she never had any intention of establishing any domicile or residence in Mexico. Therefore, the alleged Mexican divorce is a nullity and Mrs. Diehl and Mr. Diehl were

legally and lawfully married when he died.

In Jones v. Bartlett, 189 S.W. 1107, (Tex. Civ. App., 1916) error refused, the question was whether an Oklahoma divorce was entitled to full faith and credit in the courts of the State of Texas. The evidence was to the effect that the husband went to Oklahoma only for the purpose of obtaining a divorce in Oklahoma. In holding that the husband had not established a domicile in Oklahoma, the Texas court held that the Oklahoma divorce decree was void and unenforceable in Texas.

In the case of Richmond v. Sangster, (Tex. Civ. App., 1919) 217 S.W. 723, error refused, the Court said on page 729:

> "...The rule in such case is that mere going to a state for the purpose of securing a divorce and residing there the required length of time but without any intention of remaining there permanently or indefinitely is not sufficient to give jurisdiction in divorce proceedings...."

To the same effect, Burke v. Burke, (Tex. Civ. App., 1953) 255 S.W. 2d 908; and Callicoatte v. Callicoatte, (Tex. Civ. App., 1959) 324 S.W. 2d 81, refused n.r.e.

In the case of Bell v. Bell, 21 S. Ct. 551, the question was whether a Pennyslvania divorce was valid which was obtained by the husband who had his residence in the State of New York. This Court held that since the husband had not established his domicile in the State of Pennsylvania that the divorce decree was not entitled to full faith and credit in the State of New York.

The Trial Court held in its Memorandum Opinion dated November 25, 1968, that it was unnecessary to pass on the validity of the Mexican divorce, for it is clear that the taxpayer (Mrs. Diehl) is estopped from challenging the validity of the Mexican divorce.

The doctrine of estoppel is not

available to third parties who were not parties to the transaction and the doctrine of estoppel is not available to the Government in this case.

In 22 Tex. Jur. 2d, Estoppel, page 660, says:

I. Introductory

Section 1. Definition.

The broad concept of estoppel is that one who by his speech or conduct has induced another to act in a particular manner ought not to be permitted to adopt an inconsistent position, attitude or course of conduct and thereby cause loss or injury to the other. In other words, he who by his language or conduct leads another to do what he would not otherwise have done must not subject the other to loss or injury by disappointing the expectations on which the latter acted.

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Section 2. Nature and purpose.

Estoppel is equitable in nature. Its purpose is to prevent inconsistency and fraud resulting in injustice, and to protect those who have been misled by that which on its face was fair.

An estoppel is defensive in character

and does not in itself create a new right or cause of action. An estoppel cannot be invoked as an instrumentality for gain or profit; it operates only to protect the person invoking it in a right previously acquired, or from a loss already inflicted.

The principal of estoppel is ordinarily not applicable to the state or to a political subdivision while it is acting in aid of the state's sovereign powers.

22 Tex. Jur. 2d, Estoppel, page 664, says:

II. Estoppel in Pais or Equitable Estoppel

A. Generally

Section 4. In general.

Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting the rights that might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has, in good faith, relied on that conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.

In Cone v. Cone, 266 S.W. 2d 480, (Tex. Civ. App., 1953) the Court said on page 482:

"....'Mutuality being requisite, an estoppel operates neither in favor of, nor against, strangers --this is persons who are neither parties nor privies to the transaction out of which the estoppel arose....'"

See also Buckner Orphans Home v. Berry, 332 S.W. 2d 771, (Tex. Civ. App., 1960) Ref., N.R.E., which held that an estoppel operates only on the parties to a transaction and their privies and not as to strangers to the transaction.

In Campbell v. Campbell, 362 S.W. 2d 904, (Tex. Civ. App., 1962), the Court said on page 909:

"In Judgments, 33 Tex. Jr. 2d, Sec. 104, p. 622, the rule is stated:

"'Generally, a party may not complain of a judgment rendered by consent or agreement, and such a judgment waives all errors committed before its rendition except those that involve the jurisdiction of the court.'"

See 86 A.L.R., page 88, which says that the Texas cases uniformly hold that a

judgment by consent cures every character of error except fundamental error going to the jurisdiction of the court. Lessing v. Cunningham, (1881) 55 Tex. 231. See also Duke v. Gilbreath, 10 S.W. 2d 412, (Tex. Civ. App., 1928) error refused, to the same effect.

Since the Mexican court never acquired jurisdiction over Mr. and Mrs. Diehl, then the alleged divorce is void and Mr. and Mrs. Diehl were husband and wife when he died.

Shortly after the alleged Mexican divorce, Mrs. Diehl moved to Houston, Harris County, Texas, and thereafter her residence was Houston, Texas.

During about the year 1959 or 1960 Internal Revenue Service began checking the 1955 through 1957 income tax returns of Mr. and Mrs. Diehl and Internal Revenue later recommended that criminal prosecution

be brought against Mr. Diehl for each of the years 1955 through 1957. During about 1962, Mr. Diehl was indicted for alleged income tax evasion for the years 1956 and 1957. During about the year 1959 or 1960, Mr. Diehl engaged Pope to represent him on the alleged criminal proceeding which Internal Revenue was conducting. Mr. Diehl left all of his records for those years with Pope and from the time that he was indicted until his death he made a number of trips from California to Houston, Texas, in connection with this criminal matter. Mr. Diehl had a heart condition and a number of continuances were obtained in the criminal case. He later died of a heart attack.

In Covington v. Eskridge, 430 S.W. 2d 589, (Tex. Civ. App., 1968) on a plea of privilege case in which the defendant has the right to be sued in the county of

his residence (Article 1995, Texas Vernon's Annotated Civil Statutes), the defendant alleged that he was domiciled in Chicago, Illinois, but that he had business interest in Texas and that during the transaction of his business that they resided in Harris County, Texas, which is his residence. On page 590 the Court said:

> "The word 'domicile' as used in our venue statute, Article 1995, Vernon's Ann. Civ. St., has been held to mean 'residence,' which is 'a lesser-included element within the technical definition of domicile.' Snyder v. Pitts, 150 Tex. 407, 241 S.W. 2d 136, 139 (1951). It is, therefore, possible for a person to have a domiciliary residence in Illinois and a second or 'venue residence' in Texas. Taylor v. Wilson, 99 Tex. 651, 93 S.W. 109 (1906). A resident of Texas, though he be a citizen of, and have a residence in, another State, may invoke the privileges conferred by our venue laws. Gulf, C. & S. F. R. Co. v. Rogers, 37 Tex. Civ. App. 99, 82 S.W. 822 (Houston 1903, writ ref'd).
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> "We believe that the allegations in the plea of privilege, as

'supplemented,' were sufficient to bring defendants within the protection of the 'second residence' rule recognized in Snyder, Taylor and Rogers...."

In Snyder v. Pitts, 241 S.W. 2d 136, (Supreme Court of Texas, 1951) the question was whether a defendant had established a second residence apart from his domicile within the meaning of Article 1995, Texas Vernon's Annotated Civil Statutes. That Court said that on the question of the second residence, page 140, "....the presence of the wife living in a second place of abode is certainly evidence of the establishment of a second residence apart from a domicile,..." On page 142 the Court said that "Statutes regulating the local venue of legal proceedings are generally designed to provide for the convenience of the parties involved...."

For several years prior to Mr. Diehl's death, Mrs. Diehl's residence was Harris

County, Texas. Also from the time that he was indicted until his death, Mr. Diehl's main concern or his main business concern was the defense of the criminal case. His records were maintained in Pope's possession in Harris County, Texas, and Harris County, Texas, was his headquarters in connection with this defense of his criminal case. He made trips from California to Houston, Texas, for the purpose of the defense of the criminal case. Therefore, Houston, Harris County, Texas, was his second residence or his residence in Texas.

The Trial Court did not have jurisdiction in refusing to recognize Mrs. Diehl in her representative capacity since Federal Courts are without jurisdiction over matters which are strictly probate and for the administration of an estate. It has been consistently held that a Federal Court does not have such power but that those matters

are reserved to the state courts.

In Byers v. McAuley, 149 U.S. 608, 13 S. Ct. 906, this Court had before it the jurisdiction of a Federal Court over the administration of an estate. This Court held that the Federal Court would not have jurisdiction over matters which are strictly probate and for the administration of an estate and that an administrator of an estate was an officer of the State Court and that a Federal Court could not have jurisdiction to disturb possession of the estate. This Court further held that the administration laws are not merely rules of practice but laws limiting the rights of parties and will be observed by the Federal Courts. See Mitchell v. Nixon, 200 F. 2d 50, (Fifth Circuit, 1952); Strickland v. Peters, 120 F. 2d 53, (Fifth Circuit, 1941); White v. Keown, 261 F. 814, (USDC, Massachusetts, 1919); Wells v. Helms,

105 F. 2d 402, (Tenth Circuit, 1939); Princess Lida of Thurn and Taxis, et al v. Thompson, et al, 305 U.S. 456, 59 S. Ct. 275, 277, 83 L. Ed. 285; Feist v. Fidelity Union Trust Co., 29 F. Supp. 51, (USDC, New Jersey, 1939); Akin v. Louisiana National Bank of Baton Rouge, 322 F. 2d 749, (Fifth Circuit, 1963); Newhouse v. Canal National Bank of Portland, 94 F. Supp. 830, (USDC, Maine, 1950) to the same effect.

The venue of probate proceedings as fixed by Section 6 of the Texas Probate Code is jurisdictional, White v. Baker, 118 S.W. 2d 319, (Tex. Civ. App., 1938).

Section 6 of the Texas Probate Code provides:

> Section 6. Venue for Probate of Wills and Administration of Estates of Decedents.
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> Wills shall be admitted to probate, and letters testamentary or of administration shall be granted:

(a) In the county where the deceased resided, if he had a domicile or fixed place of residence in this State.

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(c) If he had no domicile or fixed place of residence in this State, and died outside the limits of this State, then in any county in this State where his nearest of kin reside.

(d) But if he had no kindred in this State, then in the county where his principal estate was situated at the time of his death.

(e) In the county where the applicant resides, when administration is for the purpose only of receiving funds or money due to a deceased person or his estate from any governmental source or agency; provided, that unless the mother or father or spouse or adult child of the deceased is applicant, citation shall be served personally on the living parents and spouses and adult children, if any, of the deceased person, or upon those who are alive and whose addresses are known to the applicant. Acts 1955, 54th Leg., p. 88, ch. 55.

In the event that Mr. Diehl was not a resident of Harris County, Texas, the Texas Probate Court would have had jurisdiction over his estate under Section 6(c) of the

Texas Probate Code since Mrs. Diehl was a resident of Harris County, Texas, and she was his nearest of kin in Texas. Black's Law Dictionary, Third Edition, page 1242 says: "The words 'next of kin', used simpliciter in a deed or will, means not nearest of kindred, but those relatives who share in the estate according to the statute of distributions, including those claiming per stirpes or by representation. Slosson v. Lynch, 43 Barb. (N.Y.) 147."

As far as Mrs. Diehl knows, the only assets of Mr. Diehl's estate was the claim against the Government for his income tax overpayment for the year 1957 and the only purpose of the administration was for the purpose of a substitution of parties in the Trial Court. Therefore, the Probate Court would have had jurisdiction over Mr. Diehl's estate under the provisions of Section 6(e) of the Texas Probate Code.

Section 8(e) of the Texas Probate Code provides that the court in which the application for probate has been filed shall have full jurisdiction to determine the venue of such proceedings and its determination shall not be subject to collateral attack. What the Trial Court has done is to collaterally attack the judgment of the Texas Probate Court appointing Mrs. Diehl as the Independent Executrix of Mr. Diehl's estate which it does not have jurisdiction to do.

In the case of Akin v. Louisiana National Bank of Baton Rouge, supra, the Fifth Circuit held on page 753 that under Louisiana law a probated testament may be annulled only by a direct action brought in the succession proceeding. The Texas law is to the same effect that a will may be set aside only in a direct proceeding and not by a collateral attack. Halbert v.

DeBode, 28 S.W. 58, (Tex. Civ. App.); Locust v. Randle, 102 S.W. 946, (Tex. Civ. App.); Volkmer v. Chase, 354 S.W. 2d 611, (Tex. Civ. App.) Reh. Den., err. ref., NRE.

In Akers v. Simpson, 445 S.W. 2d 957, (Supreme Court of Texas, 1969), that Court held that a judgment could not be collaterally attacked and that the jurisdictional recitals import absolute verity.

If the Government felt that the judgment rendered in the Probate Court was wrong, they had ample opportunity to go into the Texas Courts. The Government was an interested person, Section 3(r) of the Texas Probate Code, since they had filed their claim for income taxes against the estate with Mrs. Diehl in her representative capacity. The Government could have contested the Probate Court judgment by any one or more of the Right of Appeal, Section 28 of the Texas Probate Code, Certiorari, Section

30 of the Texas Probate Code, and Bill of Review, Section 31 of the Texas Probate Code, and the Government had two years in which to do this, Section 93, Texas Probate Code. This was pointed out in the Petitioners' answer to the Government's motion to vacate and stay proceedings and at that time the two years had not expired.

Even if Mrs. Diehl was not the proper representative of Mr. Diehl's estate, then she would have had authority to represent Mr. Diehl as the community survivor under Section 160 of the Texas Probate Code. Section 160 gives the surviving spouse power to sue for community property and to collect claims due the community.

The Trial Court did not have sufficient evidence to enter its Memorandum Opinion dated November 25, 1968, holding that Mrs. Diehl was not the representative of Mr. Diehl's estate. The facts in this Memorandum

Opinion were based on the main on the affidavit of Jones. Jones' affidavit was not based on his personal knowledge and he would not have been competent to testify as to many of the alleged facts in his affidavit. The Petitioners filed a motion to strike portions of Jones' affidavit which motion to strike should have been granted. Therefore, the Memorandum Opinion was not based on sufficient evidence and it should not have been entered.

THAT IN THE ALTERNATIVE THAT FULL FAITH AND CREDIT SHOULD HAVE BEEN GIVEN TO THE JUDGMENT OF THE PROBATE COURT, HARRIS COUNTY, TEXAS, APPOINTING DONALD G. RITTER AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF KENT B. DIEHL, SR., AND DONALD G. RITTER SHOULD HAVE BEEN SUBSTITUTED AS A PLAINTIFF IN PLACE OF KENT B. DIEHL, SR.

After the Government filed their suggestion of death of Mr. Diehl, Ritter applied to the Probate Court, Harris County, Texas, to be appointed Temporary Administrator of Mr. Diehl's estate. In that application Ritter complied with the provisions of Section 6(e) of the Texas Probate Code which provided for jurisdiction and venue over Ritter's application. Temporary administration is provided for under Section 131 of the Texas Probate Code. The basis of Ritter's application was that it was for the purpose only of receiving funds or money due to Mr. Diehl from the Government. Ritter asked that he have authority to be substituted in

place of Diehl in the Trial Court and to do anything necessary in connection with this suit. After a hearing on Ritter's application, the Probate Court appointed him Temporary Administrator over Mr. Diehl's estate and gave him full authority to do what was necessary to be substituted in place of Mr. Diehl in this cause and to do any other acts in connection with this cause of action.

On February 17, 1969, Ritter filed his motion in the Trial Court that he be permitted to be substituted in place of Mr. Diehl. The Government did not oppose that motion and so the Trial Court on April 8, 1969, entered an order substituting Ritter in his representative capacity in place of Mr. Diehl. Thereafter Ritter filed his pleadings.

On October 31, 1969, without any notice to the Petitioners, the Trial Court entered

a Memorandum Opinion and Order holding that Ritter was not a proper party to be substituted in place of Mr. Diehl and that the Probate Court did not have jurisdiction to appoint Ritter as Temporary Administrator. The Petitioners' claim and the Government's counterclaim was dismissed for want of jurisdiction.

The argument and authorities under the first point as to full faith and credit, that the Federal Courts do not have jurisdiction over matters which are strictly probate and for the administration of estates, and that a state court judgment can't be collaterally attacked would be applicable to this point and will not be repeated.

The Fifth Circuit held that under the provisions of Section 6(e) of the Texas Probate Code, the statute under which Ritter was appointed, that a temporary administrator is appointed for the purpose only of

receiving funds or money due to a deceased person or his estate from any governmental source or agency and that this would not include the right of the temporary administrator to collect these funds. However, it is submitted that the right to receive funds necessarily includes the right to collect these funds and to do whatever acts are necessary in collecting these funds. This holding of the Fifth Circuit is directly opposite to the holding of the Texas Probate Court in appointing Ritter as Temporary Administrator as that Court gave Ritter authority to do what was necessary to be substituted in place of Mr. Diehl in this cause and to do any and all acts in connection with this cause of action.

It would appear that the action of the Appellate Court is in direct violation of the teachings of this Court in Younger v. Harris, 91 S. Ct. 746 (February 23, 1971),

and Samuels v. Mackell, 91 S. Ct. 764, (February 23, 1971), which held that the Federal Courts should let the State Courts interpret the state statutes if the proceedings had been initiated in the State Courts at the time that the action was filed in the Federal Court. These two cases applied to criminal matters but Great Lakes Co. v. Huffman, 319 U.S. 293 (1943), applied the same principal to a civil matter.

Since the Government is questioning the validity of Mrs. Diehl's appointment and Ritter's appointment in the State Court and since the Government could have challenged the validity of these appointments in the Texas courts, then the Federal Court should have required the Government to proceed in the State Courts.

Petitioners submit that as an equitable matter in this case that Mrs. Diehl

should have the right of a trial in the Trial Court. The Government has assessed over a million dollars in taxes, penalties and interest in this matter which, if the assessment is valid, has two more years to run before the six year statute of limitation will apply on this assessment. After the Trial Court entered its order and while this case was on appeal to the Fifth Circuit, Congress enacted Act 26 U.S.C. Section 6013(e) which, in general, provides that if a husband and wife have filed a joint return which involves an alleged fraud penalty and on which at least 25% of the income has been understated on the return and if one of the spouse is innocent as to the alleged omitted income and the alleged fraud that the innocent spouse will not be liable for the tax on the omitted income and the alleged fraud penalty. It is submitted that Mrs. Diehl

would come under the provisions of Section 6013(e) of the Internal Revenue Code of 1954 in that on a trial of this case the most that she would be liable for would be approximately $2400.00 additional income tax and the accrued interest thereon which would amount to approximately $2000.00, or a total amount of $4400.00. Because the statute prevents injunctions against the collection of income taxes except in extraordinary circumstances and because Mrs. Diehl would never under any circumstances be able to pay the million dollar assessment prior to filing a claim for refund, then the net effect will be that, assuming the assessment is valid, that she will have an assessment of over a million dollars where she would not be liable for any more than a maximum of $4400.00.

Therefore, in the interest of justice she would be entitled to a trial in the Trial Court.

CONCLUSION

For the foregoing reasons, Petitioners ask this Court to reverse the decision of the United States Court of Appeals and hold that Mrs. Diehl should have been substituted in place of Mr. Diehl in her representative capacity and that in the alternative that Ritter should have been substituted in his representative capacity in place of Mr. Diehl.

Respectfully submitted,

Samuel Williamson
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CERTIFICATE OF SERVICE

I, Samuel Williamson, the attorney for Petitioners, hereby certify that on the 8th day of June, 1971, I served copies of the foregoing Petition for Writ of Certiorari and the separately bound Appendice on the several parties thereto as follows:

1. On the United States by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D. C. 20530, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to Mr. Johnnie M. Walters, Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D. C. 20530.

Samuel Williamson